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Hu Yanyu v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-449–09 OF 2017
UMI KALTHUM, KAMARDIN HASHIM AND STEPHEN CHUNG JJCA
8 MAY 2019

C

Criminal Procedure — Trial — Defence's story — Drug-trafficking — Whether accused failed to give good 'Alcontara Notice' to enable investigating officer to verify truth of her story that she was an 'innocent carrier' — Whether vague and imprecise particulars accused gave did not enable police to track down the D *characters that featured in her story — Whether accused's bad 'Alcontara Notice' cast no obligation on prosecution to adduce rebuttal evidence and led to irresistible inference that characters portrayed in accused's defence were fictitious*

The appellant, a female national of China, was found guilty and sentenced to E death by the High Court on a charge of trafficking in 1,574.7g of methamphetamine which was found in a bag ('P7') she was carrying upon arrival at the Kuala Lumpur International Airport ('KLIA') on a flight from Hong Kong. The drugs were found after customs officers searched P7 and its contents when a scan revealed greenish images inside P7. The drugs were not F only contained in two packets of Chinese tea that were in P7 but also in a special compartment that had been constructed in P7. In making her defence to the charge of trafficking, the appellant said her purpose for coming to Malaysia was to source for samples of cosmetics and dresses for her business in China and also to meet her friend, Zhang Xijuan ('Zhang') who was in G Malaysia at the time. The appellant said Zhang's boyfriend ('Ken') in China had given her P7 containing two packets of Chinese tea and a tea pot set to be conveyed to Zhang. The appellant said she did not suspect anything unusual and did not check P7. She put her own belongings into P7 and took the flight to Malaysia. The appellant said she subsequently received a message on her H cellphone from Ken saying that Zhang had returned to Hong Kong. The appellant said that when she was detained by the customs officers at KLIA, she showed them the particulars of the messages and calls she had made and received on her cellphone including the contact numbers of Zhang and Ken. At the end of the trial, the trial judge held that the appellant had failed to cast a I reasonable doubt on the prosecution's case and had not rebutted the statutory presumption of knowledge/possession of the drugs invoked against her under s 37(d) of the Dangerous Drugs Act 1952 nor rebutted the evidence of trafficking. The trial judge had regarded the defence's story as 'highly improbable' and as an 'afterthought'. Inter alia, he found that despite there

being many reasons for the appellant to be suspicious about Ken's request for her to transport P7, the appellant never examined the bag and its contents and remained 'willfully blind'. The trial judge took the view that Zhang and Ken were fictitious characters and that the appellant failed to give sufficient particulars to enable the investigating officer to verify the truth of her story. In the circumstances, the trial judge held that the appellant's '*Alcontara* Notice' about Zhang and Ken was bad and did not help the appellant in any way. In her instant appeal against conviction and sentence, the appellant contended that: (a) there was a break in the chain of evidence with regard to the identity of the drug exhibits; and (b) the trial judge had not considered the defence properly and had invoked the wrong burden of proof against her.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The trial judge had properly considered the defence and had addressed his mind to all issues that were raised by the appellant. On the totality of the evidence and the surrounding circumstances, the prosecution had proven the trafficking charge against the appellant beyond reasonable doubt. The conviction was amply supported by the evidence. There was no merit in the appeal (see paras 27 & 29–30).

(2) The trial judge correctly found that the appellant had failed to rebut the presumption of possession and knowledge under s 37(d) of the DDA on balance of probabilities and, overall, had failed to create any doubt on the prosecution's case at the end of the trial (see para 28).

(3) Considering the facts and circumstances of the case, there was no doubt that the drug exhibits that were seized from the appellant were the same ones that were examined by the chemist and which were produced in court at the trial. The contention that there was a break in the chain of evidence with regard to the identity of the drug exhibits had no merit (see paras 20–26).

[Bahasa Malaysia summary

Perayu, seorang wanita warganegara China, telah didapati bersalah dan dihukum mati oleh Mahkamah Tinggi atas pertuduhan mengedar in 1,574.7g methamphetamine yang dijumpai dalam beg ('P7') yang dibawa olehnya setelah tiba di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') dengan pesawat daripada Hong Kong. Dadah yang dijumpai selepas pegawai kastam memeriksa P7 dan kandungannya apabila imbasan menunjukkan imej berwarna hijau di dalam P7. Dadah itu bukan sahaja mengandungi dua bungkusan teh Cina yang terdapat dalam P7 tetapi juga dalam bahagian khas yang dibuat dalam P7 itu. Dalam membuat pembelaannya terhadap pertuduhan pengedaran, perayu mengatakan tujuannya datang ke Malaysia adalah untuk mencari sampel kosmetik dan baju bagi perniagaannya di China dan juga untuk berjumpa dengan kawannya, Zhang Xijuan ('Zhang') yang

A berada di Malaysia pada masa itu. Perayu mengatakan teman lelaki Zhang ('Ken') di China telah memberikannya P7 yang mengandungi dua bungkusan teh Cina dan kancir teh untuk diserahkan kepada Zhang. Perayu mengatakan dia tidak mensyaki apa-apa pelik dan tidak memeriksa P7. Dia telah meletakkan barang miliknya ke dalam P7 dan mengambil penerbangan ke
B Malaysia. Perayu mengatakan dia kemudian tleah menerima pesanan pada telefon bimbitnya daripada Ken mengatakan Zhang telah pulang ke Hong Kong. Perayu mengatakan bahawa apabila dia ditahan oleh pegawai kastam di KLIA, dia telah menunjukkan mereka butiran pesanan dan panggilan yang dibuat dan diterimanya pada telefon bimbitnya termasuk nombor telefon
C Zhang dan Ken. Di akhir perbicaraan, hakim perbicaraan memutuskan bahawa perayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan tidak mematahkan andaian statutori berhubung pengetahuan/milikan dadah yang digunakan terhadapnya di bawah s 37(d)
D Akta Dadah Berbahaya 1952 mahupun mematahkan keterangan berhubung pengedaran. Hakim perbicaraan telah menganggap versi pembelaan sebagai 'highly improbable' dan 'afterthought'. Antara lain, beliau mendapati bahawa meskipun terdapat banyak sebab untuk perayu berasa curiga tentang permintaan Ken untuk dia membawa P7, perayu tidak memeriksan beg itu dan
E kandungannya dan masih 'wilfully blind'. Hakim perbicaraan berpendapat bahawa Zhang dan Ken merupakan orang rekaan dan bahawa perayu telah gagal memberikan butiran tertentu untuk membolehkan pegawai penyiasat mengesahkan kebenaran versinya. Dalam keadaan berikut, hakim perbicaraan memutuskan bahawa '*Alcontara* Notice' perayu tentang Zhang dan Ken adalah
F tidak kukuh dan tidak membantu perayu dalam apa cara pun. Dalam rayuannya terhadap sabitan dan hukuman, perayu menegaskan bahawa: (a) rantaian keterangan terputus berkenaan identiti ekshibit-ekshibit dadah; dan (b) hakim perbicaraan tidak mempertimbangkan pembelaan sewajarnya dan telah menggunakan beban bukti yang salah terhadapnya.

G

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraan telah mempertimbangankan sewajarnya pembelaan dan mengarahkan mindanya kepada semua isu yang ditimbulkan oleh
H perayu. Berdasarkan keseluruhan keterangan dan keadaan sekeliling, pendakwaan telah membuktikan pertuduhan pengedaran terhadap perayu adalah melampaui keraguan munasabah. Sabitan itu disokong secukupnya dengan keterangan. Tiada merit dalam rayuan ini (lihat perenggan 27 & 29–30).

I (2) Hakim perbicaraan sewajarnya mendapati bahawa perayu telah gagal mematahkan andaian milikan dan pengetahuan di bawah s 37(d) ADB atas imbangan kebarangkalian dan, secara keseluruhan, telah gagal menimbulkan apa-apa keraguan ke atas kes pendakwaan di akhir perbicaraan (lihat perenggan 28).

(3) Berdasarkan fakta dan keadaan kes, tiada keraguan bahawa ekshibit-ekshibit dadah yang dirampas daripada perayu adalah yang sama dengan yang diperiksa oleh ahli kimia dan yang dikemukakan di mahkamah semasa perbicaraan. Hujah bahawa rantaian keterangan telah terputus berkenaan identiti ekshibit-ekshibit dadah itu tidak mempunyai merit (lihat perenggan 20–26).]

Notes

For cases on trial in general, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5655–6314.

Legislation referred to

Criminal Procedure Code s 51A
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(2), First Schedule
Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45A-128–11 of 2014 (High Court, Shah Alam)

Samantha Chong Yin Xin (Thong Seng Kong) for the appellant.
Asmah bt Musa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, a female of the People's Republic of China's national, was charged and tried in the High Court at Shah Alam with an offence of trafficking in dangerous drugs under the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu pada 14 Mac 2014, lebih kurang jam 2.30 pagi, di Cawangan Pemeriksaan Penumpang 1 (CPP1) Balai Ketibaan Antarabangsa, Bangunan Terminal Utama, Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine sejumlah 1,574.7 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the learned High Court judge ('the learned trial judge') found the appellant guilty and convicted her on the said charge. The appellant was thus sentenced to the mandatory death sentence as mandated under s 39B(2) of the Act.

[3] Aggrieved with the conviction and sentence, the appellant appealed to this court. We heard the appeal on 18 March 2019, wherein at its conclusion, we unanimously dismissed it. We now give the reasons for our dismissal.

THE PROSECUTION'S CASE IN BRIEF

[4] Briefly, the prosecution's case may be summarised as follows. On 1 March 2014 at around 2.30am, the appellant arrived at the Kuala Lumpur International Airport ('KLIA') on board Cathay Pacific Airways flight No CX 791 from Hong Kong. The appellant was spotted by a customs officer, Mohd Haizal bin Abdul Ghaffar ('PW4'). The appellant had with her a trolley bag ('P7').

[5] Upon instructions from PW4, bag P7 was scanned. PW4 noticed suspicious greenish images in the bag. PW4 then requested the appellant to produce her passport and her flight ticket which showed that the appellant came from Hong Kong on board Cathay Pacific Airways flight No CX 791. PW4 than instructed the appellant to bring P7 to a counter next to the scanning machine for examination.

[6] At the counter, the appellant opened the bag P7 using combination numbers. Inside the bag, PW4 discovered two packets of Chinese tea together with lady's garments. PW4 observed that the two Chinese tea packets were exceptionally heavy. Upon the second time scanning of the bag P7 by Mohd Nazri bin Shafie ('PW6'), the same greenish images still appeared from the bag. This prompted PW4 to direct the appellant to take the bag P7 into the 'Bilik Pemeriksaan Penumpang 1' (CPP1) for a more detailed search.

[7] The detailed search of the bag P7 was done by PW6 witnessed by the appellant and a few other customs officers including the investigating officer, Sazali bin Unus (PW12). There was a baggage tag attached to the bag bearing the appellant's name. At this time it was observed that the appellant looked 'gelisah and sedih'.

[8] PW6 discovered there was a special compartment when PW6 unscrewed the bag. Inside the compartment, PW6 recovered a package containing white powdery substance suspected to be dangerous drugs. Inside the two Chinese tea packets earlier recovered from inside the bag, PW6 found each packet to contain crystalline substance suspected to be dangerous drugs.

[9] All the exhibits suspected to be dangerous drugs were later sent by PW12, the investigating officer, to the Chemistry Department for analysis which were received by the chemist, Suhana bt Ismail ('PW7'). Upon her analysis, PW7 confirmed that the exhibits she received from PW12 contained

1,574.7g of methamphetamine. They were the subject matter of the charge under appeal before us. PW7 also confirmed that methamphetamine is a dangerous drug listed under the First Schedule of the Act. PW7's chemist report was tendered and marked as P44, which can be found on p 68, appeal record Vol 3(1).

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[10] The learned trial judge had considered and accepted the evidence of PW7 on the drugs analysis undertaken by the witness. The learned trial judge concluded that there was no defect in PW7's analysis and held that PW7 was a credible witness. The learned trial judge accepted the evidence of PW7 as to the type and weight of the impugned drugs, the subject matter of the charge.

[11] As for the element of possession, based on the factual matrix of the case that the appellant was detained by PW4, she was pulling a trolley bag P7 from where the impugned drugs were recovered, the learned trial judge held that the appellant had custody and control of the bag P7. Thus, the appellant was having under her custody and control of the impugned drugs found inside the bag. Coupled with the conduct of the appellant looking 'gelisah and sedih' which was relevant and receivable under s 8 of the Evidence Act 1950, the learned trial judge invoked the statutory presumption under s 37(d) of the Act for the element of knowledge of the impugned drugs.

[12] As for the element of trafficking, the learned trial judge relied on the evidence that the appellant's overt act in carrying and concealing the drugs in the bag P7 and transporting them from Hong Kong into Malaysia coupled with the huge amount of the drugs which could not have been for her own personal consumption, the learned trial judge found that the appellant was trafficking in the proscribed drugs pursuant to the definition of 'trafficking' under s 2 of the Act.

[13] After being satisfied that all the elements of the charge had been established, the learned trial judge held that the prosecution had proven a prima facie case against the appellant on the charge proffered. Thus, the appellant was called upon to enter her defence.

THE DEFENCE

[14] The appellant elected to give evidence under oath. The appellant was the sole witness for the defence. In her evidence, the appellant stated that this was her second time she came to Malaysia. She came to source for samples of cosmetics and dresses for her business in China. She came to Malaysia this time

on the suggestion by her female friend, Zhang Xijuan, who was already in Malaysia by that time. She was interested with the suggestion and she travelled to Guangzhou and then to Hong Kong to catch the flight to Malaysia.

[15] The appellant further testified that she met up with Ken, the boyfriend of Zhang Xijuan in Guangzhou. Ken was asking for her help to carry two packets of Chinese tea and a tea pot set for Zhang Xijuan which were put in the bag P7 to be conveyed to Zhang Xijuan who was in Malaysia then. On Ken's suggestion, the appellant put her own belongings into P7. She did not suspect anything and she did not check P7.

[16] When she reached Hong Kong Airport, she received an SMS through 'WeChat' from Zhang Xijuan informing her that the latter had returned to Hong Kong. The appellant than contacted Ken and she was told that she should carry the bag P7 with her to Malaysia. Ken told her that his friend in Malaysia will later collect the bag P7 from the appellant.

[17] The appellant stated that the same bag P7 was scanned at the Hong Kong Airport but did not counter any problem. When she was detained at the KLIA, she gave her full cooperation to the custom officers as she did not suspect anything incriminating in P7. She had shown her hand phone to the officer which contained the SMS, calls, contact number and even pictures of Zhang Xijuan. She frequently met Zhang Xijuan and Ken in Guangzhou but they have since moved to other places as stated in the SMS.

[18] After considering the appellant's version, the learned trial judge found that the appellant had failed in raising a reasonable doubt on the prosecution's case. The learned trial judge also found that the appellant had failed to rebut the statutory presumption of knowledge under s 37(d) of the Act on the balance of probabilities. The learned trial judge was satisfied that the prosecution had proved beyond reasonable doubt the case of trafficking as per the charge.

[19] The appellant was thus convicted and sentenced to suffer the mandatory death penalty as mandated under s 39B(2) of the Act. Hence, the appeal before us.

THE APPEAL

[20] Before us, learned counsel for the appellant canvassed the following three issues:

(a) break in the chain of evidence with regard to the identity of the drugs exhibits;

(b) the appellant's defence was not properly considered by the learned trial judge; and

(c) wrong burden of proof was invoked by the learned trial judge against the appellant.

OUR DELIBERATION AND DECISION

[21] On the issue of break in the chain of evidence with regard to the identity of the drugs exhibits, learned counsel's complaint centered on the following three factors:

(a) the disappearance of any sign of cutting by PW6 on the exhibit;

(b) the search list (P22) was altered and the original search list was not tendered; and

(c) discrepancies in the weight of the impugned drugs.

[22] There were three packets of tea bags recovered by PW6 from the bag P7. All had been marked by PW6 as A1(1)(P10A), A2(1)(P10B) and A3(1)(P10C), initialled and dated respectively. The same exhibits were handed over by PW6 to the investigating officer, PW12, as evinced by the 'Borang Serahan Kes' (P41) and later were handed over to PW7 for analysis. The same exhibits were produced in court and had been identified by PW6 and PW12 through the markings that they had made on the exhibits including the date and the signatures on the tea bags containing the impugned drugs. PW7 also had identified the markings as found on the exhibits when she received it from PW12.

[23] As to the discrepancies of weight, it was not disputed that PW7 found the gross weight of the drug exhibits to be 2,064.8g (P44) while PW6 found it to be 2,140g. Thus, there was a difference of 75.2g. Learned counsel argued that there was no explanation and this created a reasonable doubt as to the identity of the drug exhibits. We agreed that it would have been desirable for the prosecution to offer an explanation but based on the facts and circumstances of this case and other like cases, we had no doubt that the drug exhibits seized from the appellant and as examined by PW7, which were produced in court were the same drug exhibits that the appellant was charged with.

[24] We agreed with the learned deputy public prosecutor's ('learned DPP') argument that the weighing process by the customs officer (PW6) was not the determining factor in the weight of the drugs, but the weighing done by the chemist (PW7) which determined the actual weight of the drugs and formed the basis of the charge, which is 1,574.7g of methamphetamine.

[25] Having regard to the evidence of PW6 and PW7, learned counsel argued further that there was doubt as to the drug exhibits which PW6 admitted that he had made a small cut to have a look at the contents. However, PW7 had found no tear or any cut when she received the exhibits. We had perused the evidence of PW6 and we did not discover that PW6 did make a cut in one of the packets. Instead PW6 explained at pp 157–158 of the appeal record Vol 2(2) under re-examination that:

> S: Merujuk soalan selanjutnya tentang tindakan kamu yang potong plastik teh tersebut. Rujuk gambar barang kes (P13) — 14, 15 dan 16–20.
>
> Boleh jelaskan 14–20 gambar mula-mula potong sedikit macam mana?
>
> J: Saya potong sedikit di bahagian atas. Saya ambil pisau dan saya cucuk sedikit dan saya nampak kelihatan serbuk kristal.
>
> S: Tujuan berbuat demikian?
>
> J: Untuk melihat di bahagian dalam.
>
> S: Selanjutnya tadi dalam keterangan kamu, kamu ada menyatakan bahawa melihat Alfishah yang membuat ujian test kit tersebut. Bagaimana cara dia melakukan ujian test kit tersebut, samada dia buka kertas karbon tersebut atau macamana?
>
> P.B.: I didn't mention about Alfishah how he did it.
>
> TPR: Saya rephrase.
>
> S: Saya baca balik soalan peguam. 'Adakah kedua-dua A1 dibuka, saya tidak tahu, dia yang buka ke tidak, Alfishah yang buat ujian test kit, saya yang keluarkan bungkusan, Alfishah yang beritahu ada Meth'.
>
> Boleh jelaskan situasi itu macam mana tentang bungkusan yang samasa ujian test kit dibuat?
>
> J: Alfishah menggunakan satu alat yang menyentuh bungkusan kertas karbon tadi dan mendapat satu hasil bacaan.

[26] With respect to the search list (P22), learned counsel's complaint was that a copy of the search list served on them under s 51A of the Criminal Procedure Code was without the signature of the appellant. Therefore, the search list was tampered and the prosecution witnesses had failed to explain the same. With respect, in our view learned counsel's contention was misconceived. We find that this issue about unsigned search list served on the defence counsel had been explained by PW12 at pp 290–292 of the appeal record Vol 2(4) as follows:

> J: Sebenarnya semasa serahan Senarai Bongkar memang terdapat Senarai Bongkar yang tidak ditandatangani oleh OKT tetapi kandungan kepada kedua-dua Senarai Bongkar ini adalah sama, terdapat salinan yang lebih dibagi oleh Pegawai Serbuan.
>
> Kalau kita melihat muka surat 3 dan 4 tarikh yang sama, 1 Mac 2014 dan pegawai yang menyerah ialah Mohd Nazri bin Shafie dan juga terdapat tandatangan saya dan pegawai yang menyerah tetapi tidak terdapat tandatangan OKT.

Pada muka surat 4, terdapat juga pada tarikh yang sama, 1 Mac 2014 di mana Mohd Nazri bin Shafie telah menandatangani sebagai pegawai penyerah dan di bawah tersebut adalah tandatangan saya bersama tandatangan OKT.

P.B.: P22 berapa muka surat?

J: Ada 4 muka surat.

P.B .: Saya ada 3 sahaja.

Mah: P22, 3 muka surat.

J: Kalau kita lihat dari segi borang P22 ini terdapat tandatangan saya dan tandatangan OKT dan pada Senarai Bongkar yang satu lagi tiada terdapat, ini bermaksud Senarai Bongkar yang diserahkan oleh Pegawai Serbuan adalah lebih. Jadi Pegawai Serbuan, OKT ada menandatangani satu sahaja untuk Senarai Bongkar.

S: Boleh kamu jelaskan kepada Mahkamah salinan yang asal yang ada tandatangan disimpan bersama dengan IO atau di dalam kertas siasatan?

J: Kebiasaan kita akan menyimpan satu Senarai Bongkar asal yang telah lengkap di dalam satu simpanan dan satu lagi salinan akan diletakkan di dalam kertas siasatan.

S: Seingat kamu yang bertandatangan OKT di dalam simpanan siapa?

J: Yang bertandatangan OKT saya simpan sewaktu saya menjadi Pegawai Penyiasat.

S: Yang tanpa tandatangan OKT disimpan di mana?

J: Kemungkinan di dalam kertas siasatan.

S: Ada kamu pengetahuan tentang penyerahan dokumen di bawah Seksyen 51A?

J: Tiada.

S: Di dalam penelitian terhadap D45 dan P22 adakah kandungan sama?

J: (Mohon rujuk).

Kandungannya sama, butiran di dalam kedua-duanya ada sama kandungannya.

[27] On the second issue, learned counsel's complaint was on the failure by the learned trial judge to adequately consider the defence of the appellant. We disagreed with the appellant's contention. In the present case, the learned trial judge had considered the appellant's defence and had addressed his mind to all issues raised by the defence counsel to justify his finding. This can be seen from his judgment at pp 27–32 of the appeal record Vol 1:

34. Saya bersetuju dengan hujah TPR terpelajar bahawa pembelaan T hanyalah bersifat 'afterthought' dan rekaan beliau samata-mata untuk melepaskan diri beliau daripada pertuduhan ini. Versi-versi yang dinyatakan oleh T adalah 'highly improbable' di atas alasan-alasan berikut:

(a) Menurut T beliau datang ke Malaysia untuk mendapatkan sampel-sampel pakaian dan kosmetik untuk dijual di Negara China. Pada hal pakaian-pakaian di negara tersebut begitu juga kosmetik boleh didapati di Negara China dan Hong Kong dengan mudah dan juga tidak melibatkan kos yang tinggi untuk tambang kapal terbang dan juga bayaran sewa hotel

dan lain-lain. Juga barangan-barangan tersebut di Negara China dan Hong Kong juga mempunyai kualiti yang diiktiraf di peringkat antarabangsa.

(b) T tidak menafikan bahawa beliau mempunyai masa yang banyak untuk memeriksa kandungan beg P7 dan beg P7 itu sendiri selepas beliau menerimanya daripada seorang bernama Ken seperti yang dinyatakan oleh T. T sepatutnya, sebagai seorang yang munasabah mempunyai syak terhadap Ken mengapakah perlu mengirimkan beg P7 yang berisi pakaian-pakaian Zhang Xijuan ke Malaysia sedangkan sepatutnya tahu bahawa Zhang Xijuan akan balik ke China dalam masa terdekat.

(c) T juga telah gagal untuk mengambil peluang untuk memeriksa beg P7 tersebut seolah-olah beliau menutup matanya terhadap sesuatu fakta yang jelas di hadapannya. Saya merujuk kepada kes *Hon Boon Thong vs PP* [2010] 5 CLJ 240.

[73] The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v Hla Win* at p 438, 'the concept of wilful blindness qualifies the requirement of knowledge'. And his Lordship continued further by saying (at the same page):

> As Professor Glanville Williams aptly remarked in his *Textbook on Criminal Law*, at p 125:
>
> ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know.

[74] Continuing at the same page, his Lordship said:

> In *Ubaka v PP* [1995] 1 SLR 267, the principles laid down in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v PP* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
>
> Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance simpliciter is not enough.

35. Di dalam kes ini terdapat banyak sebab untuk T merasa syak dan curiga, namun T telah 'wilfully shut her eyes' dan ini menunjukkan bahawa T mempunyai pengetahuan berkenaan dengan dadah-dadah di dalam beg P7 tersebut.

36. Saya juga merujuk kepada keputusan Mahkamah Rayuan di dalam kes *Baharudeen Mohamed Yusoff Ghaney v PP* (P-05–471–2010) yang antara lain mensasarkan kepada Mahkamah Perbicaraan supaya mengkaji dan meneliti fakta di dalam sesuatu kes itu dengan lebih halusi dan teliti secara keseluruhannya. Penghakiman tersebut berbunyi seperti berikut:

Again we are in complete agreement with the trial judge that the conduct of the accused displayed nothing short of wilful blindness towards the contents of the 31 tins inside P7. He also correctly relied on the Singapore Court of Appeal case *Zulfiikar bin Mustaffah v PP* [2001] 1 SLR 633, although there are our own reported cases on the same issue. It was held in that case:

> It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs ... In short, ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance simpliciter is not enough.

37. Seterusnya mengenai watak Zhang Xijuan dan Ken yang dikatakan oleh T sebagai pengedar dadah sebenarnya juga adalah semata-mata rekaan T. Dengan tanpa mengemukakan apa-apa butiran mengenai mereka dan dengan mengatakan yang 2 nombor telefon mereka itu berada di dalam telefon bimbitnya adalah tidak mencukupi untuk pihak pegawai penyiasat kes menyiasat. Oleh itu saya berpendapat watak-watak ini adalah tidak wujud. Saya merujuk kepada *Rengarajan Thangavelu vs PP* (di atas) yang memutuskan bahawa di dalam keadaan seperti itu '*Alcontara* Notice' adalah tidak dapat membantu, di para 10, telah diputuskan berikut:

> [10] In respect of ground (i) we have meticulously looked into the cautioned statement. There was no sufficient information for the police to investigate the case in relation to the person 'Pandian' who the appellant says gave the drugs to him. And also there was no sufficient information of the person who the appellant says the drugs were supposed to be handed over to by him as per 'Pandian's' direction. From the decided cases, the information in the cautioned statement without sufficient information of 'Pandian' and the purported recipient is a story and is not a good '*Alcontara* Notice' for placing an obligation on the part of the prosecution to rebut the same. The story if true, places the prosecution to rebut the same. The story if true, places the burden on the appellant to rebut trafficking on the balance of probabilities. That is to say, he may have to call 'Pandian' or the purported recipient to give evidence in support of his case. However, if he has given a good 'Alcontra Notice' the obligation will be for the prosecution to track down 'Pandian' or the purported recipient to ascertain the truth of the appellant's story. At least the prosecution will be obliged to lead evidence to say what steps they have taken to verify the appellant's story to the satisfaction of the court. A bad '*Alcontara* Notice' does not help the appellant at all but imposes an obligation on the appellant to lead evidence in relation to his story to rebut trafficking, that too on a balance of probabilities. In *Phiri Mailesi (Zambian) v PP* [2013] 5 MLJ 780; [2013] 1 LNS 391, the Court of Appeal through Hamid Sultan bin Abu Backer JCA on '*Alcontara* Notice' had this to say: It is pertinent to note that the '*Alcontara* Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence. In addition the defence's version should be put at the prosecution stage and the story must be maintained at the defence stage. There will be a duty

placed on the judge even at the prosecution stage to positively evaluate the story of the accused relating to '*Alcontara* Notice' before evaluating the prosecution case and applying the maximum evaluation as *Alcontara* case places the onus on the prosecution to rebut or sufficiently explain that they have discharged that onus. In the instant case evidence will show that the defence has not given an '*Alcontara* Notice' in the right perspective.

[28] With regard to the third and final issue on the issue of burden of proof, we agree with the learned DPP that the learned trial judge did not err in his findings and decision. At para 39 of his judgment, learned trial judge was correct in his finding that the appellant had failed to rebut the presumption of possession and knowledge under s 37(d) of the Act on the balance of probabilities and overally had failed to create doubt in the prosecution's case at the end of the trial. We find no merit in learned counsel's complaint on this issue.

CONCLUSION

[29] Having regard to the totality of the evidence and the surrounding circumstances of the case, it was our finding that the trafficking charge had been proven beyond reasonable doubt against the appellant.

[30] For all the reasons above stated, we held that there was no merit in the appeal. The conviction was safe and amply supported by the evidence on record. Therefore, the appellant's appeal was dismissed, and the conviction and sentence of the High Court was affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar